(4) (3)

Nos. 87-963; 87-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT L. HERNANDEZ,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

KATHERINE JEAN GRAHAM, RICHARD M. HERMANN, AND DAVID FORBES MAYNARD,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Writ Of Certiorari To The United States Courts Of Appeals For The First And Ninth Circuits

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BRIEF FOR COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principle of religious liberty. The organization's objectives and purposes include promoting the constitutional principle of the free exercise of religion, opposing any encroachment by governmental agencies which would limit or tend to inhibit such exercise, and responding to other acts interfering with the full experience of religious freedom.

The Council is a membership organization with dues-paying members located throughout the United States. The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, but all recognize the importance of preserving and promoting the right of religious organizations to carry out their ministries free from governmental intrusion, whether that interference be from the Executive, Legislative, or Judicial Branches of the government.

The Council on Religious Freedom speaks to the legal issues raised in this litigation, not because they support the doctrinal interests of or align themselves with the Church of Scientology, but because it is concerned with what it perceives to be the Tax Court's and the First and Ninth Circuit Courts' of Appeal flawed analyses of the charitable deduction provisions of the Internal Revenue Code.

The Council believes that the decisions of the Tax Court and the First and Ninth Circuits will result in government entanglement with church affairs which may ultimately jeopardize the charitable deduction provisions of the Internal Revenue Code as they relate to religious organizations generally.

The Council further believes that its broad perspective on the matters of church-state separation and government intrusion into church affairs, as well as its particular knowledge of various religious beliefs and practices, enable it to bring a dimension of analysis before this Court not necessarily presented by the parties.

SUMMARY OF ARGUMENT

Amicus curiae contends that the only constitutionally appropriate test that may be applied to charitable contributions made by a church member to his or her church under 26 U.S.C. § 170(a) is the objective determination of whether there is a measurable economic or financial benefit received or expected by the donor and that the expectation of a spiritual benefit unaccompanied by such a financial benefit should not render any payment to a religious organization non-deductible as a contribution.

The decisions of both the First Circuit in *Hernandez* v. *Commissioner*, 819 F.2d 1212 (1st Cir. 1987), and the Ninth Circuit in *Graham* v. *Commissioner*, 822 F.2d 844 (9th Cir. 1987), appear to violate the requirement of neutrality which the Religion Clauses of the First Amendment impose upon the government of the United States. Likewise, these decisions require the Judicial Branch of government to enter into the religious thicket: their approach compels a judicial analysis of religious matters—matters of which the civil courts have no competence.

The contrary result reached by the Second Circuit, with the same set of facts, in *Foley* v. *Commissioner*, 844 F.2d 94 (2d Cir. 1988), and by the Eighth Circuit in *Staples* v. *Commissioner*, 821 F.2d 1324 (8th Cir. 1987), is sensitive to religious practices and more consistent with the policies underlying the statutory provision.

Finally, *amicus curiae* believes that the courts' analyses in *Hernandez* and *Graham* would jeopardize section 170 deductions for all contributions to religious organizations.

ARGUMENT

I. The Holdings Of The Courts In *Hernandez* And *Graham*, Which Conclude That A Charitable Deduction Should Be Denied If A Church Member Gives Money Or Property To His Or Her Church With The Expectation Of Receiving A Spiritual Benefit In Return, Are Inconsistent With Congressional Intent In Enacting Section 170 Of The Internal Revenue Code.

Appellants in *Hernandez* and *Graham*, as well as the taxpayers in *Staples* and *Foley*, are all members of the Church of Scientology and make "fixed donations" to their church, which are for "various religious services provided by the Church of Scientology." *Graham* v. *Commissioner*, 83 T.C. 575, 580 (1984). This type of "fixed donation" constitutes the majority of the Church of Scientology's funds and is used to pay the costs of church operations and activities. *Id.* at 578. The Second Circuit in *Foley* found that "[a]ppellants were fully aware that the principal support of their church was derived from the payments received from auditing and training." *Foley* v. *Commissioner*, 844 F.2d 94, 97 (2d Cir. 1988).

Under section 170 of the Internal Revenue Code of 1954, individuals are permitted to deduct "any charitable contribution" they make to a "church." The Tax Court in *Graham* specifically held that the payments made by petitioners to their church "were made with the expectation of receiving a commensurate benefit in return." *Graham*, 83 T.C. at 581. It is, however, clear from the opinion that the "benefit" referred to by the court was "religious services." *Ibid.* In *Hernandez* the court stated:

> We find no indication that Congress intended to distinguish the religious benefit sought by Hernandez from the medical, educational, scientific, literary, or other benefits that could likewise provide the *quid* for the *quo* of a nondeductible payment to a charitable organization.

Hernandez, 819 F.2d at 1217. Likewise, the *Graham* court stated:

> It is also the rule that the deductibility of a contribution does not depend on whether the benefits received in return are secular or religious.

Graham, 822 F.2d at 849.

Conversely, the court in *Foley* specifically held:

> The individual benefits gained by appellants through participation in their religious rituals, and the payment of fixed fees for that participation, cannot be considered so equivalent as to pass the donation/purchase line. . . . As in the case of the deductible donation described previously, it must be presumed that the primary purpose of the dona-

tions was a charitable expectation that the religious causes of the Church would be furthered, *Murphy* v. *Commissioner*, 54 T.C. 249 (1970), and that only incidental benefits accrued to the individual donors. In any event, there is no way of measuring spiritual or religious benefits in such a way as to conclude that they are "commensurate" with the fees paid for participation in the religious activities giving rise to those benefits.

Foley v. *Commissioner*, 844 F.2d at 97.

Similarly, the court in *Staples* stated:

> Finally, as the Staples suggest in their brief, "our tax system does not treat religious services as commodities that are purchased in commercial transactions." Form sometimes is important in identifying a § 170 contribution because a payment appearing to be a purchase of an item of value creates the presumption that the transaction was not a donation. Rev. Rul. 67-246, 1967-2CB 104, 105. Regardless of form, however, no similar presumption can arise when the item "purchased" was the right to participate in religious practice. Spiritual gain to an individual church member cannot be valued by any measure known in the secular realm. As the Tax Court stated, privileges arising from church membership "are not significant return benefits that have a monetary value within the meaning of § 170." *Murphy* v. *Commissioner*, 54 T.C. 249, 253 (1970). The establishment by a church of a set "price" for religious participation does not change the nature of the benefit of religion to the individual or to society. If the Scientologist "prices" were deemed to make participation in their religious services a material, financial, or economic benefit such that the Staples' payments were not contributions, then "the passing of the collection plate in church would make the church service a commercial project." *See Murdock* v. *Pennsylvania*, 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943).

Staples, 821 F.2d at 1327.

The overriding concern to *amicus* Council on Religious Freedom is whether the receipt or expectation of a spiritual, as distinguished from an economic or financial, benefit by a church member will prevent the tax deductibility of a donation

made to a church. Section 170 of the Code provides, subject to certain limitations, a deduction for contributions to or for the use of organizations described in Internal Revenue Code § 170(c).

The Internal Revenue Service has held that "a contribution or gift is a voluntary transfer of money or property made by the transferor without receipt or expectation of a *financial or economic benefit* commensurate with the money or property transferred." Rev. Rul. 76-185, 1976-1 C.B. 60 (emphasis added). It has also ruled that "[a] gift for the purpose of section 170 of the Code is a voluntary transfer of money or property that is made with no expectation of procuring a commensurate *financial benefit* in return for the transfer." Rev. Rul. 72-506, 1972-2 C.B. 106 (emphasis added). *See also* Rev. Rul. 76-232, 1967-1 C.B. 62.

In Rev. Rul. 71-580, 1971-2 C.B. 235 the Internal Revenue Service found that a nonprofit organization formed to compile genealogical research data on its family members, in order to perform religious ordinances in accordance with the precepts of the religious denomination to which they belonged, qualifies for exemption from federal income tax under § 501(c)(3) of the Internal Revenue Code. In that ruling the IRS noted that the services were paid for by church members through "membership fees" (presumably fixed) to provide genealogical research information to a church to enable it to conduct certain religious ordinances in accordance with basic religious doctrines of the church.

The ruling specifically held:

> The law of charity generally recognizes that the saying of mass or the conduct of similar religious observances under the tenets of a particular religion are of a *spiritual benefit* to all of the members of that faith and to the general public. Any *private benefit to a given family or individual* that may result is regarded as merely incidental to the general benefit that is served. Therefore, the subject organization is similarly accomplishing a charitable purpose by engaging in an activity that advances religion. [emphasis added]

Id. at 236.

A more recent revenue ruling, Rev. Rul. 80-302, 1980-2 C.B. 182, distinguished the facts in Rev. Rul. 71-580, 1971 C.B. 235 from a situation where an organization compiles family genealogical research data for use other than to conform to the religious precepts of the family's denomination. In Rev. Rul. 80-302, 1980-2 C.B. 182-183 the IRS stated: "Rev. Rul. 71-580 is also distinguishable because the genealogical research data in the instant ruling is not compiled in order to perform religious ordinances in accord with the precepts to which the family members belong."

In *Haak* v. *United States*, 451 F.Supp. 1087 (W.D. Mich. 1978), cited by the Tax Court in *Graham*, 83 T.C. at 581, the district court, citing S.Rep. No. 1622, 83d Cong., 2d Sess., (1954), 1954 U.S. Code Cong. & Admin. News, pp. 4621, 4830-31; H.R. Rep. No. 1337, 83d Cong., 2d Sess. (1954), 1954 U.S. Code Cong. & Admin. News, pp. 4017, 4180, concluded that "[t]he legislative history of the Internal Revenue Code of 1954 indicates that a primary factor to be considered in determining whether a transaction is a charitable contribution is whether the 'contribution . . . [is] made with no expectation of a *financial return* commensurate with the amount of the gift.'" (emphasis added).

In *Haak*, 451 F.Supp. at 1091, the court also held that "the structuring of section 170 manifests a congressional intent to focus on the *use* to which an alleged contribution is put, *rather than on the state of mind of the transferor.*" The district court in *Haak* also suggested that in "[r]eading the Revenue Act of 1950 (26 U.S.C. §§ 511, *et seq.*), in conjunction with section 170, when a charitable organization is engaged in one of the charitable activities enumerated by Congress, contributions in furtherance of those activities are to be encouraged and therefore properly exempt from taxation." *Id.*

The court in *Haak* also noted that Congress was concerned that such contributions not be used to obtain services similar to those provided by private business, since this would provide an

unfair advantage to the charitable organization. *Id.* The court indicated, contrary to the judicial inquiry made by the Tax Court below, that "there is good reason to avoid unnecessary intrusions of subjective judgments as to what prompts the financial support of the organized but non-governmental good works of society." *Id.* at 1091-1092.

The congressional intent, therefore, seems to dictate that the rule to be followed in determining whether payments made by a member to his or her church are deductible must not be based upon subjective, administrative or judicial analysis. The government and the courts therefore should not look so much to the state of mind of the giver but rather to the use to which the donation is put.

The "fixed donations" the Church of Scientology receives are the primary source for the support of the church's operations and activities. *Graham*, 83 T.C. at 578. Congress has determined that the operation of a religious organization is an activity which is to be encouraged by tax exemptions and charitable deductions. The providing of "spiritual services" also does not collide with congressional concerns respecting unfair competition between charitable organizations and private business.

Therefore, the appropriate test to be applied, and the test which has been applied in the past, is objective—that is, whether there is a measurable economic or financial benefit received or expected by the donor. The expectation of a spiritual benefit unaccompanied by such a financial benefit should not render any payment to a religious organization *non-deductible* as a contribution under section 170 of the Internal Revenue Code.

We believe that the Eighth Circuit correctly perceived the congressional intent of section 170 when it stated that "[a] construction of section 170 sensitive to religious practice would be consistent with the policies underlying the statutory provision." *Staples*, 821 F.2d at 1326.

In *Staples* the court correctly held:

> In sum, we conclude that regardless of the timing of the payment or details of the church's method of soliciting contributions from its members, an amount remitted to a qualified church with no return other than participation in strictly spiritual and doctrinal religious practices is a contribution within the meaning of § 170.

Staples, 821 F.2d at 1327. *See also Foley* v. *Commissioner*, 844 F.2d at 97, citing *Staples*.

II. The Holdings Of The Courts In *Hernandez* And *Graham* That The Expectation Of A Spiritual Benefit Voids The Deductibility Of A Church Member's Contribution Violate The Religion Clauses Of The First Amendment To The United States Constitution.

The "financial benefit" test here advanced and previously used by the Internal Revenue Service is consistent with the requirements of the Religion Clauses of the First Amendment. In order to make an appropriate constitutional analysis of the decision in the instant case, it is first necessary to determine whether the interpretation made by the IRS violates fundamental rights requiring strict scrutiny and exacting judicial review. *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 294 (1981); *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976).

Murdock v. *Pennsylvania*, 319 U.S. 105, 111 (1943), suggests that the power to tax religious activities is the power to destroy a church. In *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 692 (1970), the Court was sensitive to the fact that "the cessation of 'tax' exemptions would have a significant impact on religious organizations." (Brennan, J., concurring). In fact as Justice Brennan noted in his concurring opinion in *Walz*, "[b]y diverting funds otherwise available for religious or public service purposes to the support of Government, taxation would necessarily affect the extent of church support for the enterprises that they now promote." *Id.* at 692.

Recently this Court suggested a similarity between tax exemptions and tax deductions, contending that both "are a form of subsidy that is administered through the tax system." *Regan* v. *Taxation With Representation*, 461 U.S. 540, 544 (1983). The denial of tax benefits to a religious organization will inevitably have a substantial impact on the operation of the organization. *Bob Jones University* v. *United States*, 461 U.S. 574, 603, 604 (1983). It is clear that a tax deduction does constitute, at least, indirect aid to the charitable organization. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 790-791 (1973); *see* also *Mueller* v. *Allen*, 463 U.S. 388 (1983). The elimination of such a deduction therefore must constitute a burden on religion subjecting the governmental action to constitutional review under the Religion Clauses of the First Amendment to the United States Constitution.

It is not sufficient to say, as the Tax Court did in this case, that "[i]t is well established that there is no constitutional right to a tax deduction." *Graham*, 83 T.C. at 581. Whether there is a constitutional right to a tax deduction is not the issue. Here, Congress has determined that tax deductions will be granted for contributions and donations to charitable organizations, including churches.

The court in *Hernandez* at least contended that although "[i]t is clear that while the First Amendment does not require the government to provide a tax deduction for gifts to religious and other charitable institutions . . . once it has created such a tax benefit, the government may not condition receipt of the benefit upon the abandonment of religious beliefs or practices." *Hernandez* v. *Commisioner*, 819 F.2d at 1221.

In scrutinizing the decision of the Internal Revenue Service, it is necessary to consider the admonition of the Court in *Larson* v. *Valente*, 456 U.S. 228, 244 (1982), wherein the Court stated "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Justice Harlan indicated in his concurring opin-

ion in *Walz* v. *Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., concurrng), that while a government may be neutral,

> neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.

The Tax Court's exclusion from tax deduction status of "fixed donations" made by a church member to his or her church, where spiritual benefits may be expected in return, requires a careful assessment of whether scrupulous neutrality was observed in making this exclusion. *See Roemer* v. *Board of Public Works*, 426 U.S. 736, 745-746 (1976). In *Everson* v. *Board of Education*, 330 U.S. 1, 15, 18 (1947), the Court warned that government must "be neutral in its relations" with religion. Likewise in *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952), the Court declared "[t]he government must be neutral when it comes to competition between religious sects. . . ."

In *Larson* v. *Valente*, 456 U.S. at 245, the Supreme Court observed relative to the principle of religious neutrality that:

> This constitutional prohibition of denominational preferences is inextricably connected with the continuing vitality of the Free Exercise Clause. . . . Madison's vision—freedom for all religion being guaranteed by free competition between religions—naturally assumed that every denomination would be equally at liberty to exercise and propagate its beliefs. But such equality would be impossible in an atmosphere of official denominational preference. Free exercise thus can only be guaranteed when legislators—and voters—[and the Internal Revenue Service] are required to accord to their own religions the very same treatment given to small, new or unpopular denominations.

The issue is not whether the petitioners in this case were precluded from engaging in constitutionally-protected activities. *Graham*, 83 T.C. at 582. Nor is the issue whether the petitioners should be permitted to have their constitutionally-

protected activity subsidized. *Id.* The issue is whether the petitioners, as members of a new, small church were treated with the same neutral benevolence by the government as members of other churches. Once government has made the determination to permit tax deductions for charitable donations made to religious organizations, then the government is required to be *scrupulously neutral* in deciding the question of deductibility.

The Tax Court apparently believed, and the Ninth Circuit affirmed, that the interpretation made by the Internal Revenue Service, here at issue, is not subject to constitutional attack because the test for determining the deductibility of claimed charitable contributions is based upon secular criteria. *Id.* at 583. The relevant distinction, however, is not whether the test is based upon a secular criteria. Rather, the question is whether there has been unequal treatment accorded to certain churches and their members by the Internal Revenue Service's determination, even if this determination is based upon secular criteria.

The court in *Hernandez* rejected the contention that the disallowance of the deduction "communicates any disfavor for his religious beliefs or practices." *Hernandez* v. *Commissioner*, 819 F.2d at 1224. It also rejected the claim that Hernandez "is the victim of selective enforcement by the IRS." *Id.* at 1225. *Amicus*, however, believes that differential treatment by the IRS has in fact placed a burden on an interest protected by the First Amendment. In *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), the Supreme Court dealt with a use tax on the cost of paper and ink products consumed in the production of publ.cations. The statute contained a $100,000 exemption provision.

Justice O'Connor, in writing the majority opinion concerning a special tax that singled out a small portion of the press for separate treatment, held that, "A tax that burdens rights protected by the First Amendment cannot stand unless the bur-

den is necessary to achieve an overriding governmental interest." *Id.* at 582-583. Justice O'Connor explained:

> . . . [D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. . . . [citations omitted] Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

Id. at 585.

In *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976), the Court directed its attention to the exacting scrutiny that must be applied even when there is only indirect governmental action burdening First Amendment rights.

> "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, *not through direct governmental action*, but *indirectly as an unintended but inevitable result of the government's conduct* . . ." [citation omitted]. Thus encroachment "cannot be justified by a mere showing of a legitimate state interest" . . . [citation omitted] The interest advanced must be paramount, one of vital importance, and *the burden is on the government to show the existence of such an interest*. [emphasis added]

Most churches suggest a spiritual reward will be received by one making a contribution to the church.[1] It would be repug-

[1] Malachi 3:10, a scripture of the Bible's Old Testament setting forth the principle of tithing followed by many churches, states: "Bring ye all the tithes into the storehouse, that there may be meat in mine house, and prove me now herewith, saith the Lord of hosts, if I will not open you the windows of heaven, and pour you out a blessing, that there shall not be room enough to receive it."

Both the Seventh-day Adventist Church and the Church of Jesus Christ of Latter-day Saints subscribe to the Biblically based doctrine

nant to First Amendment principles if the offer of such a of tithing wherein 10% of an individual's increase (income) is contributed to the church in addition to other offerings. In the publication issued by the Seventh-day Adventist Church entitled *Counsels on Stewardship*, Ellen G. White, one of the church's founders, deals with "the message of Malachi," stating:

> The Lord calls for His tithe to be given to His treasury. Strictly, honestly, and faithfully, let this portion be returned to Him. Besides this, He calls for your gifts and offerings.

E.G. White, *Counsels on Stewardship* at 82. The author, in discussing the tithing responsibility, commented on a church member who had failed to pay his tithe and who had thereafter given a promissory note to the treasurer of the church for the unpaid amount of the tithe. The author related that this note stated "[f]or value received, I promise to pay—" and explained that the church member who had failed to pay his tithe stated, "Have I not been receiving the blessings of God day after day? Have not the angels guarded me? Has not the Lord blessed me with all spiritual and temporal blessings? For value received, I promise to pay the sum of $571.50 to the church treasurer." *Id.* at 95-96.

In this same publication under the section entitled "The Reward of Faithful Stewardship," the author, who holds a special place in the Seventh-day Adventist Church, discussed temporal blessings that are bestowed upon the benevolent:

> Whenever God's people, in any period of the world, have cheerfully and willfully carried out His plan in systematic benevolence and in gifts and offerings, they have realized the standing promise that prosperity should attend all their labors just in proportion as they obeyed His requirements. When they acknowledged the claims of God, and complied with His requirements, honoring Him with their substance, their barns were filled with plenty.

Id. at 347.

David O. McKay, the ninth president of the Church of Jesus Christ of Latter-day Saints, in his book *Gospel Ideals* (1953), explained that "tithing consists 'of one-tenth of all the interest annually.'" McKay, *Gospel Ideals* 197 (1953). He stated that "[t]o members of the Church of Jesus Christ, therefore, tithing is as much a law of God as is baptism." *Id.* He further explained that tithing "is God's plan of raising revenue for the Church." *Id.* at 198. "[A]side from these social and temporal benefits resulting from a compliance to this law as a social factor, tithing makes its greatest appeal to the sincere mind because of its spiritual significance. It is an unfailing source of spiritual power." *Id.* at 199.

spiritual reward nullifies the benefit of section 170. To so hold would require the civil courts to enter a religious thicket from which they are constitutionally barred. Courts' involvement in selecting which spiritual rewards do, and which do not, jeopardize section 170 treatment can only lead to unequal and therefore discriminatory action upon the part of the Internal Revenue Service.[2]

The Internal Revenue Service has previously upheld deductions for pew rentals, building fund assessments, and periodic dues paid to a church. Rev. Rul. 70-47, 1970-1 C.B. 49. *See also* A.R.M. 2, C.B. 1, 1500 (1919). In Rev. Rul. 78-366, 1978-2 C.B. 241, the Internal Revenue Service indicated that an estate tax deduction is allowable for a bequest made to a church to say regularly scheduled masses for deceased members.[3] The

[2] A holding that a Scientologist is not entitled to a charitable deduction because he receives spiritual benefits in return for the contribution seems strangely inconsistent with the Internal Revenue Service's treatment of contributions to a religious order by a member of that order who, by reason of membership, is entitled to lifetime care and support by that religious community. Those joining religious orders and taking the mandatory vow of poverty, in effect, make a 100% fixed donation to their order in return for which they receive continued support and care. The Supreme Court of Mississippi in *Maas* v. *Sisters of Mercy of Vicksburg*, 99 So. 468, 472 (1924), determined that a vow of poverty was an enforceable contract holding "that as long as they are members enjoying the benefits derived from such membership, which in case of the Sisters of Mercy consists of a home and comfortable support and care in sickness and death, that is sufficient consideration for their obligation to bring all the property received by them during their membership into the community for the benefit of all." *See also Order of St. Benedict of New Jersey* v. *Steinhauser*, 234 U.S. 640 (1914). Nevertheless, Rev. Rul. 76-323, 1976-2 C.B. 18, has stated that members of religious orders employed outside of the religious community are entitled to a charitable deduction under § 170(c)(2) for the amounts donated to the religious order.

[3] The Code of Canon Law (in English translation) in Canon 1264 states:

> Unless the law prescribes otherwise, it is for the provincial Bishops' meeting to . . . determine the offerings on the occasion of the administration of the sacraments and sacramentals.

Council understands that auditing in the Church of Scientology holds the same meaning to a Scientologist as a mass would for a Roman Catholic.

In *Thomas* v. *Review Board of Indiana*, 450 U.S. 707, 714 (1981), the Court stated:

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, ... However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

In *Thomas* the Court further indicated that in this "sensitive area" the Court does not have the competence to decide religious matters. *Id.* at 416. It is not constitutionally appropriate for the Internal Revenue Service or the Tax Court to attempt to distinguish between a fee paid to a Catholic Church for a mass to be said for a deceased relative, a membership fee paid to provide genealogical research data in order to perform religious ordinances and a "fixed donation" paid by a Scientologist to his church for an equally meaningful spiritual experience, to the member of that church, so long as they are all paid in accordance with the precepts of the respective religious organization.

A long line of constitutional cases suggests that it is constitutionally inappropriate for civil courts to determine what does and what does not have religious meaning. As the Supreme Court said in *New York* v. *Cathedral Academy*, 434 U.S. 125, 133 (1977):

> The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment. . . .

From the above it should be apparent that the Tax Court, in reaching for some meaningful distinction, adopted a test which would directly place the Internal Revenue Service and ultimately the Tax Court in a role which they constitutionally

may not play. The Council suggests that the only test appropriate under the Religion Clauses of the First Amendment to the Constitution of the United States is whether the church member receives a measurable economic or financial benefit, as distinguished from a spiritual benefit. Such a test would apply "neutral principles of law" and could be administered by the IRS and the civil courts without offending the First Amendment to the United States Constitution. *Jones* v. *Wolf*, 443 U.S. 595, 604 (1979).

One can only conclude from the selective determinations made by the IRS in favor of donation for a Catholic mass, and against donation for a Scientology religious service that the determinations are suspect. Council on Religious Freedom is concerned about the possible eventual elimination of all tax deductions for all churches in the event this Court should permit the IRS to allow tax deductions for such selected activities as the celebration of masses for deceased relatives, while excluding practices having a spiritual meaning for Scientology. The very process of selectively applying these interpretations to church organizations creates a high risk of government entanglement with church affairs that may well be the final straw that accomplishes what Justice Brennan warned against in *Walz*:

> Although governmental purposes for granting religious exemptions may be wholly secular, exemptions can nevertheless violate the Establishment Clause if they result in extensive state involvement with religion.

Id. at 689, (Brennan, J., concurring).

There is a total absence of any showing that Congress intended to exclude from section 170 deductibility treatment donations of funds to churches which might also result in the receipt of spiritual services by parishioners. In light of the constitutional problems that are presented by the government's expansion of the "economic benefit" test to include "spiritual benefits," section 170 should be interpreted to exclude such an overly broad extension which would impinge on First

Amendment interests. *See NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

III. The Tax Court Improperly Suggests That The Church Of Scientology, In Providing Religious Services, Operates In A Commercial Manner.

It seems apparent that the Tax Court veered down the wrong road when, in analyzing the facts in this case, it concluded that "[t]he Church of Scientology operates in a commercial manner in providing these religious services." *Graham*, 83 T.C. at 578. This comment is a nonsequitur and involves a concept which flies in the face of earlier decisions of the United States Supreme Court. In *Murdock* v. *Pennslyvania*, 319 U.S. 105 (1943), this Court dealt with a solicitation statute providing for a licensing tax. In that case the ordinance had been applied to itinerant literature evangelists. In its analysis, the Court stated:

> The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds. Thus it was stated in *Jones* v. *Opelika*, *supra*, [316 U.S. at] p. 597, that when a religious sect uses "ordinary commercial methods of sales of articles to raise propaganda funds," it is proper for the state to charge "reasonable fees for the privilege of canvassing." Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital.

Id. at 110.

The Court in *Murdock* further commented:

> But the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise.

In *Jones* v. *City of Opelika*, 319 U.S. 103 (1943), this Court took the unusual step of reversing its prior decision in the same case, 316 U.S. 584, so as to make the decision of the Court consistent with its decision in *Murdock*. The reasoning in the

dissenting opinion in that case seems similar to the reasoning of the Tax Court in this case. Justice Reed commented:

> And even if the distribution of religious books was a religious practice protected from regulation by the First Amendment, certainly the affixation of a price for the article would destroy the sacred character of the transaction. A literature evangelist becomes also a book agent.
>
> The rights which are protected by the First Amendment are in essence—prayer, mass, sermons, sacraments, not sales of religious goods.

Id. at 132.

Of interest is the fact that even Justice Reed in *Opelika* would have given First Amendment protection to prayers, masses, sermons and sacraments, even though excluding sales of religious goods. In light of the above it would be constitutionally improper for the Tax Court to predicate its decision on any finding that the Church of Scientology, in providing any of its spiritual services, operates in a commercial manner.

CONCLUSION

Accordingly, *amicus curiae* urges this Court to reject the reasoning of the First and Ninth Circuits in *Hernandez* and *Graham* and to embrace the holdings of the Second and Eighth Circuits in *Foley* and *Staples* determining that the order of the Tax Court should be reversed.

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Respectfully submitted,

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